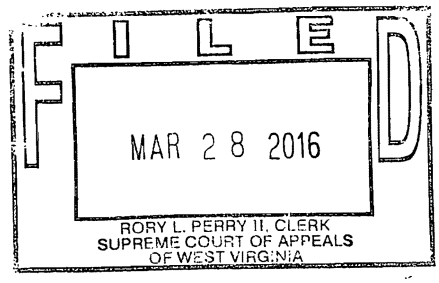
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CASE NO.: 15-1207
(Kanawha County Circuit Court Docket No.: 14-AA-91)



JOHN STRALEY,
Petitioner-Appellant,

v.

PUTNUM COUNTY BOARD OF EDUCATION
Respondent-Appellee.

APPELLANTS BRIEF

Andrew J. Katz, Esquire
The Katz Working Families' Law Firm, LC
The Security Building, Suite 1106
100 Capitol Street
Charleston, West Virginia 25301
(304) 342-5579
ajk792000@yahoo.com
Counsel for Appellant

I. TABLE OF CONTENTS

SECTION		PAGE
II.	Table of Authorities	3
III.	Assignments of Error	4
IV.	Statement of the Case	4
V.	Summary of Argument	7
VI.	Statement Regarding Oral Argument and Decision	7
VII.	Argument	7
	A. STANDARD OF REVIEW	8
	B. STATEMENT OF LAW	9
	C. DISCUSSION	10
	APPELLANT'S GRIEVANCE WAS TIMELY FILED BECAUSE RESPONDENT'S STATUTORY FAILURES CONSTITUTE A CONTINUING VIOLATION OF HIS RIGHTS AND ALSO BECAUSE HE FILED WITHIN FIFTEEN WORK DAYS OF HAVING A DEFINITE GRIEVABLE EVENT	
VIII.	Conclusion	13
	Certificate of Service	

III. TABLE OF AUTHORITIES

CASES	PAGE
Board of Education of Wood County v. Airhart, 569 S.E.2d 422 (W. Va. 2002)	13
Board of Education of Tyler County v. White, 605 S.E.2d 814 (W. Va. 2004)	13
Bolyard v. Kanawha County Bd. of Educ., 194 W. Va. 134, 136, 459 S.E.2d 411, 413 (1995)	8
In Re Queen, Syl. Pt. 1, 196 W. Va. 442, 473 S. E. 2d 483 (1996)	8
Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)	8, 12
Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979)	11
Quinn v. West Virginia N. Comty. Coll., 197 W. Va. 313, 475 S.E.2d 405 (1996)	8

STATUTES	
West Virginia Code Section 6C-2-2©	10
West Virginia Code Section 6C-2-4(a)(1)	10, 12
West Virginia Code Section 18A-4-16	9, 11
West Virginia Code Section 29-6A-7	8

III. ASSIGNMENT OF ERROR

1. The lower court erred in upholding the decision by the West Virginia Public Employees Grievance Board dismissing Petitioner John Straley's grievance for not being timely filed because his grievance was filed within 15 days of the last event of a continuing violation. Appellant's contract of employment drafted by Respondent unlawfully combined a regular bus run with an extracurricular run. Thus, every time Appellant was required to perform his extracurricular run as part of his regular contract, an additional statutory violation occurred. Mr. Straley was required to perform his extra curricular runs at the time he filed his grievance.

2. The lower court erred in upholding the decision by the West Virginia Public Employees' Grievance Board dismissing Petitioner John Straley's grievance for not being timely filed when such grievance was filed within 15 days of a specific grievable event: the denial of Mr. Straley's request to perform an extra duty bus assignment because of a scheduling conflict created by the extracurricular portion of Mr. Straley's regular bus run.

IV. STATEMENT OF THE CASE

Mr. Straley (hereinafter referred to by name, as the "Petitioner" or as the "Appellant") is now and has been for all relevant times a bus operator for Respondent Putnum County School Board. Joint Appendix, Volume I, page 1[1]. The chain of events that led to this grievance started in September-October of 2012, when Mr. Straley bid on, and was awarded, a certain regular bus route consisting of a typical morning and afternoon run. See id. However, in addition to the

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[1] Hereinafter, references to the Joint Appendix will be in the form of Jt. Ap. V. __, p. __..

regular bus run, the route includes making an after school extra curricular run from Hurricane Middle School to either Hurricane High School or Valley Park during the fall for the cross country team. Jt. Ap. V. I, p.2; Jt. Ap. V. II, p. 82. The cross country season lasts from August to mid to late October. Jt. Ap. V. I, p.2.

The extracurricular portion of Mr. Stralyey's run for the cross country team is not subject to its own contract. See Jt. Ap. V. II, p. 82 (showing through the route description of route 2803 that transporting the cross country team members is part of Petitioner's regular bus run). As such, the maximum hours to be worked, the pay and the other terms and conditions of this work were not mutually agreed upon by the parties. Moreover, there was no separate posting and bidding for this position.

Appellant continued this run in the fall of 2013, including the extra curricular part thereof. Because of the additional time that the extra curricular cross country assignment takes, Petitioner has been prevented him from bidding on certain extra duty afternoon runs[2]. Jt. Ap. V. I, p. 2; Jt. Ap. V. II, p. 46 (stating that at the time of the Level III hearing, he missed out on bidding on four extra duty runs). Thus, on August 29, 2013, Petitioner missed out on an extra duty run that he could have done, but for the time it took to perform the extra curricular assignment. Id.

Mr. Straley filed a grievance on September 11, 2013, before the Grievance Board. This tribunal dismissed Mr. Straley's matter without reaching the merits. Jt. Ap. I, p. 9. The Grievance

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[2] An "extra duty" run is different then an extra curricular duty in that the former is not a regularly scheduled event. See Jt. Ap. V. II, p. 15. For example, the taking of the cross country team to and from daily practice is an extra curricular run. However, taking the cross country team to one specific event, for example, the state cross country championship, would be an extra duty run.

Board decided that Appellant's grievance was not timely filed. Id. This ruling is erroneous as a matter of law for the reasons set forth in the Argument section below and should be reversed. Mr. Straley filed an appeal to that decision to the Circuit Court of Kanawha County, which upheld the Grievance Board's decision. His appeal is now before this Court.

V. SUMMARY OF ARGUMENT

This matter is an appeal of a dismissal of John Straley's grievance filed before the West Virginia Public Employees Grievance Board (Grievance Board). The substance of Mr. Straley's grievance, which was never ruled upon below, is that he was required to accept an extra curricular bus assignment as part of his regular bus run for which he bid, in opposition to his rights under the West Virginia Code. This matter was dismissed by the Grievance Board because Mr. Straley did not file his grievance within 15 days of accepting the posted position (which included both the regular and extra-curricular assignment together)[3]. Instead, Mr. Straley filed his grievance very early within the following school year and within 15 days of being denied the opportunity to bid on a extra duty assignment because of a scheduling conflict created by having to do the extracurricular portion of his run.

The lower court, and the Grievance Board, erred by ruling that Respondent's statutory violation in having Mr. Straley work under an unlawful contract was not a continuing violation. The tribunals below fixated on the posting of the position and said that any wrongs that happened after that was only a continuing damages, not a continuing violation. However, these legal

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[3] Mr. Straley was represented by a West Virginia Education Association staff employee before the grievance Board.

bodies erred in focusing only on the wrongful posting of the position. That was only part of the manner in which Respondent violated Mr. Straley's rights. The continuing violation occurred by forcing him to work under his unlawful contract. More specifically, the unlawful part of the contract was the combination of a regular bus run and an extracurricular run into one contract. This violation re-occurred every time he had to work thereunder-certainly every time that he had to do the extra-curricular portion of that contract. Since Mr. Straley filed his grievance while the cross country season was on-going, it was timely filed.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Of course, this Honorable Court best knows if oral argument will assist clarifying any points raised by the parties. Appellant believes that it will.

Appellant request a "Rule 19" argument. While there is case law regarding the meaning of a "continuing violation," this Court should take the opportunity to establish that making an employee work under a flawed employment contract is a continuing violation.

VII. ARGUMENT

Respondent violated the West Virginia Code when it required Mr. Straley to take an extracurricular run dropping off cross country team members as part of the regular run that he successfully bid on. Respondent violated Mr. Straley's rights every time that he had to make that extracurricular run as part of his regular run. As Appellant was in the midst of the cross country season when he filed his grievance, such grievance was timely filed.

A. STANDARD OF REVIEW

The appeal provisions of W. Va.. Code § 29-6A-7 provide that an appeal may be taken to a circuit court where the final grievance decision:

(1) Is contrary to law or a lawfully adopted rule or written policy of the employer;
(2) Exceeds the hearing examiner's statutory authority;
(3) Is the result of fraud or deceit;
(4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
(5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

"A final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board . . .and based upon findings of fact, should not be reversed unless clearly wrong[4]." Quinn v. West Virginia v. Comty. Coll., 197 W. Va. 313, 475 S.E.2d 405 (1996). Further, an appellate court accords deference to the findings below. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 304,465 S.E.2d 399, 406 (1995). The reviewing court must defer to the ALJ's factual findings that are supported by substantial evidence, and give substantial deference to inferences drawn from these facts. Id. Conversely, there is a *de novo* review of the conclusions of law and application of law to the facts. Id.. Quinn, 475 S.E.2d at 408, *citing* Bolyard v. Kanawha County Bd. of Educ., 194 W. Va. 134, 136, 459 S.E.2d 411, 413 (1995). Ultimately, an appellate court uses both a deferential and plenary standard of review, giving

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[4] "Clearly wrong" is when a decision constitutes a misapplication of the law, entirely fails to consider an aspect of the problem or offers an explanation that runs counter to the evidence offered or offers an implausible explanation. See In Re Queen, Syl. Pt. 1, 196 W. Va. 442, 473 S. E. 2d 483 (W. Va. 1996).

some deference to an ALJ's findings of fact, but reviewing *de novo* any ruling of law and the application of law to the facts.

B. STATEMENT OF LAW

West Virginia Code Section 18A-4-16 both defines extra curricular work and sets forth certain rights bus operators have when applying for and performing such work. This Code provision states that: "Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis." Thus, the requirement for Appellant to transport the cross country runners as part of his regular bus run certainly meets the definition of an extracurricular duty.

Duties that are deemed to be extracurricular can only be assigned upon mutual agreement of the employee and the superintendent, or a designated representative thereof, subject to approval of the local board of education. Id. All of the terms and conditions of the extracurricular assignment must be in a written contract, including, but not limited to, the maximum hours to be worked.. Id. Such contract must be separate from the employees regular duty contract. W. Va. Code Sections 18A-4-16(2)-(4).

The lower tribunal ruled that Appellant did not timely file his grievance below. A grievance must be filed "[w]ithin fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or **within fifteen days of the most recent occurrence of a continuing practice**

giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing."[5] West Virginia Code § 6C-2-4(a)(1)[6] (emphasis added). Here, Appellant's grievance was timely filed for the reasons set forth below.

C. DISCUSSION

APPELLANT'S GRIEVANCE WAS TIMELY FILED BECAUSE RESPONDENT'S STATUTORY FAILURES CONSTITUTE A CONTINUING VIOLATION OF HIS RIGHTS AND ALSO BECAUSE HE FILED WITHIN FIFTEEN WORK DAYS OF HAVING A DEFINITE GRIEVABLE EVENT

The lower tribunal ruled that Mr. Straley's grievance was not timely filed. This decision constitutes legal, reversible error. As will be explained below, Respondent's failure to create a separate contract for Appellant's regular and extra curricular runs constitutes a continuing violation of the law that repeats itself every time Mr. Straley is required to perform the extra curricular portions of his duties. Additionally, Mr. Straley's grievance was filed within 15 working days of being denied the ability to successfully bid on a extra duty run. Thus, Appellant's grievance was timely filed on that basis.

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[5] The laws and regulations pertaining to the procedures of the West Virginia Public Employees Grievance Board should be liberally construed. Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

[6]"'Days' means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."West Virginia Code § 6C-2-2(c).

1. Respondent's Requirement That Appellant Make an Extra-Curricular Run as Part of His Regular Bus Run, Without a Separate Contract, Constitutes a Continuing Unlawful Practice Such That a New 15 Day Filing Period Opened after Every Extra Curricular Run.

There can be no doubt that Mr. Straley's assignment to transport the cross country runners daily after school from Hurricane Middle School to either Hurricane High School or Valley Park is an extra curricular activity as defined by West Virginia Code Section 18A-4-16. This transportation duty is "regularly occurring" during the season and occurs after regular hours.[7]

The fact that the cross country bus run is an extra curricular assignment means that there are a series of statutory requirements that must be met. For example, there is a statutory, non discretionary, duty to have a separate contract for an extra curricular assignment and the employee's regular assignment. Perhaps even more importantly, a bus operator's regular bus run can not be conditioned upon the acceptance of a extra curricular assignment, as is the case here. As the West Virginia Code states: "[a]n employee's contract of employment **shall** be separate from the extracurricular assignment agreement provided for in this section and **shall not** be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board. Thus, here, Respondent is violating the mandatory duty of having a separate contract for the regular duty and

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[7] Respondent may try to argue that this is not an extra curricular duty because it does not occur "after hours." However, that argument easily fails. The whole reason why Appellant can not bid on extra duty jobs is because the cross country run extends his time performing his bus duties beyond the regular work day. The fact that Mr. Straley's extra curricular run occurs outside of his regular work day is the very reason why he can not bid on extra duty positions.

extra curricular duty and also violated the prohibition from conditioning the ability to receive a regular duty on a required acceptance of an extracurricular assignment.

Thus, Respondent has a non-discretionary duty to provide a separate contract to Mr. Straley for his regular run and his extracurricular run. Similarly, Respondent is prohibited from conditioning the receipt of a regular bus run on the acceptance of performing an extra curricular run. These duties and proscriptions existed just as much at the time when Mr. Straley filed his grievance as it did when he first started driving his bus route. In fact, these still exists today. The fact that at the time Mr. Straley filed his grievance, he still did not have separate contracts for his regular and extracurricular assignments and was required to perform, uncompensated, the extra curricular run during cross country season was a present violation of Mr. Straley's statutory rights[8]. Thus, as anticipated by West Virginia Code Section 6C-2-4(a)(1) Appellant's grievance was filed within 15 days of the "most recent occurrence of a continuing practice giving rise to the grievance."

While this exact scenario has not been adjudicated by the West Virginia Supreme Court, conceptually Appellant's situation is not very different from cases in which it has applied the continuing practice language of the West Virginia Code relied upon by Appellant here. For example, in the case of Martin v. Randolph County Board of Education, Syl. Pt. 5, 465 S.E.2d 399 (W. Va. 1995), the state high court recognized that an act of "misclassification" was a continuing practice. The Martin Court essentially decided that once a person was forced to work in the wrong classification, that error is continuous or repeating. Similarly, the West Virginia

[8] The same is true regarding the fact that Mr. Straley was not able to negotiate the terms of his contract; indeed, is not even being compensated for performing the extra duty assignment.

Supreme Court of Appeals has ruled that acts of discrimination or violations of the uniformity provisions are continuous violations. See Martin supra; Board of Education of Wood County v. Airhart, 569 S.E.2d 422 (W. Va. 2002); and Board of Education of Tyler County v. White, 605 S.E.2d 814 (W. Va. 2004). In misclassification and discrimination grievances, the statutory illegality is ongoing. Therefore, the ability to timely grieve continues as long as the harm does.

Similarly here, Appellant is forced to work continually under a contract that is illegal in terms of the requirements of the West Virginia Code. Just like in cases of misclassification and discrimination, the violation of Appellant's rights continues until the harm is abated. Since Mr. Straley's statutory rights were still being violated when he filed his grievance, such grievance is timely filed.

The merits of Appellant's grievance were not adjudicated by the Grievance Board. This honorable Court should either find that Appellant's rights were violated on its face and rule for him or remand this matter back to the Grievance Board in order for it to do so.

2. Appellant Filed His Grievance Within 15 Days of His Not Being Able to Take an Extra Duty Bus Assignment, Which Is a Grievable Event

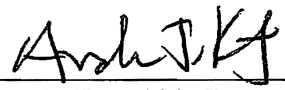
On August 29, 2013, and on two subsequent dates, Respondent posted a certain afternoon extra duty run. However, Appellant could not perform these runs because of the extra time taken by his extracurricular assignment. Mr. Straley has a right to bid on these runs just like other bus operators. The denial of his being able to take this extra duty run is a grievable event.

The Grievance Board Decision on appeal did not reach the merits of Mr. Straley's grievance on this or any issue. This matter should be remanded back to the lower tribunal so that such adjudication can be made.

VIII. CONCLUSION

Mr. Straley should prevail for the reasons contained herein.

JOHN STRALEY
By Counsel



Andrew J. Katz (6615)
The Katz Working Families Law Firm, LC
The Security Building, Suite 1106
100 Capitol Street
Charleston, West Virginia 25301

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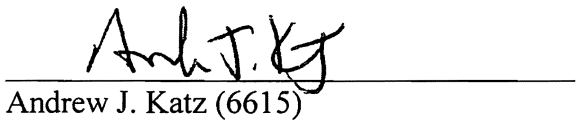
CERTIFICATE OF SERVICE

I, Andrew J. Katz, counsel for Petitioner-Appellant John Straley, do hereby certify that I have on the 28th day of March, 2015 caused to be served a true copy of **APPELLANT'S BRIEF, JOINT APPENDIX VOLUME I, JOINT APPENDIX VOLUME II,** and **APPELLANT'S MOTION TO PERFECT HIS APPEAL OUT OF TIME** via United States Postal Service regular mail to the following individual:

Rebecca Tinder, Esquire
Bowles, Rice, McDavitt, Graff & Love
PO Box 1386
Charleston, WV. 25311



Andrew J. Katz (6615)
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